

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMAR WHITE,

Defendant-Appellant.

UNPUBLISHED

June 16, 2011

No. 297716

Wayne Circuit Court

LC No. 2008-017865-FH

Before: METER, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of felon in possession of a firearm, MCL 750.224f. He was sentenced as a third habitual offender, MCL769.11, to one to ten years' imprisonment. Because there was no error in the jury instructions and because the trial court did not abuse its discretion in refusing to dismiss the charges against defendant as a sanction for an alleged discovery violation, we affirm.

In the early morning hours of January 24, 2008, defendant was pulled over by Detroit police after he ran a red light. One of the police officers jumped out of the squad car and approached the passenger side window of defendant's vehicle as it was rolling to a stop. According to the officer, defendant, who was in the driver's seat, removed a gun from his waistband and put it in the center console of the vehicle as the officer was approaching. The officers removed defendant and his passenger from the vehicle, and one of the officers recovered a gun from the center console of the vehicle. Defendant was thereafter charged with felon in possession of a firearm, carrying a concealed weapon, and felony firearm.

The case was bound over to the circuit court, at which time, defendant moved to suppress certain evidence against him. An evidentiary hearing on defendant's motion followed, during which defendant also moved to dismiss the charges against him based upon the police department's failure to preserve the in-car videotape of his arrest. The trial court denied defendant's motion and the matter proceeded to jury trial. The jury ultimately found defendant guilty of the charge of felon in possession, and not guilty of the charges of carrying a concealed weapon and felony firearm. This appeal followed.

On appeal, defendant first contends that his right to a fair trial was violated due to the trial court's failure to properly instruct the jury on the elements of the felon in possession charge. Specifically, defendant asserts that the trial court erred in refusing to instruct the jury that

defendant must *knowingly* possess or transport a firearm in order to be convicted of being a felon in possession. We disagree.

Generally, this Court applies a de novo standard of review when it reviews jury instructions that involve questions of law, and reviews a trial court's determination of whether an instruction is applicable to the facts of a case for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Jury instructions should be read as a whole, rather than examined piecemeal, to determine if there is error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Reversal is not required if the jury instructions fairly present the issues and sufficiently protect the defendant's rights. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002).

Prior to deliberations, defense counsel requested that CJI 2d 8.5, addressing “mere presence,” be given to the jury as part of its instructions. CJI 2d 8.5, however, is to be given when a defendant is charged under an aiding and abetting theory. Defense counsel acknowledged this fact, but contended that it also applied to defendant’s situation because the mere fact that defendant was in a vehicle where a gun was found does not equate with his knowledge of or carrying the weapon. The trial court declined to provide the requested instruction because defendant was not charged under an aiding and abetting theory. The jury was thereafter instructed on the charge of felon in possession as follows:

The defendant is charged with having possessed or transported a firearm in this state after having been convicted of a specified felony. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the defendant possessed or transported a firearm in this state. Second, that the defendant was convicted of a specified felony. Third, that the defendant’s right to possess, use, or transport, sell, or receive a firearm has not been restored pursuant to Michigan law.

During deliberations, the jury sent out a note requesting further explanation of “charge #1, ‘transport.’” The trial court advised counsel that he consulted Black’s Law Dictionary for a definition of the term “transport,” and that he would be providing that definition to the jury. Defense counsel objected, stating that the entire instruction should be re-read, given that defining just one word allows that term to be taken out of context. Counsel further argued that the jury should be instructed that defendant had to “knowingly” transport the gun. The trial court responded that knowledge was not an element of the offense and that he would thus not include the word “knowingly” in the definition of transport provided to the jury. The trial court then instructed the jury that “transport means to carry or convey a thing from one place to another.” According to defendant, because the jury appeared to have been confused about the instruction, and because knowledge is an element of felon in possession, the trial court failed to accurately explain the applicable law to the jury.

Felon in possession of a firearm requires proof that (1) the defendant was in possession of a firearm and (2) the defendant had previously been convicted of a specified felony. MCL 750.224f(2); CJI2d 11.38a. Because the parties stipulated that defendant had committed a prior

felony, and was not eligible to possess a firearm, the only element in question is defendant's possession of the gun.

Possession of a weapon may be actual or constructive and may be proven by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989). “[A] defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant.” *Id.* at 470-471. Thus, despite the fact that the felon in possession statute (MCL 750.224f) contains no requirement of knowledge, knowledge has been found to be a factor in cases involving constructive possession of weapon. See, *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000).

Here, however, there was no allegation of constructive possession. Instead, evidence was presented that defendant had actual possession of the weapon. Officer Salisbury testified that she was a passenger in a patrol car when she and her partners initiated a traffic stop of defendant. She testified that as the patrol car was coming to a stop, she jumped out of her passenger seat and quickly approached defendant’s vehicle. Officer Salisbury testified that when she reached the passenger side of the vehicle, she saw defendant remove a gun from the waist of his pants and put it in the center console.

Officer Janoskey testified that he saw his partner, Officer Salisbury, approach the passenger side of defendant’s vehicle and that he then exited the patrol car and approached the driver’s side of defendant’s vehicle. According to Officer Janoskey, as he approached the vehicle he saw the driver, defendant, shut the center console. It is undisputed that a gun was recovered from the center console of the vehicle. Thus, the evidence indicated that defendant had actual possession of the weapon and knowledge would thus not be a question for purposes of determining his guilt or innocence.

Moreover, in the jury note that prompted defense counsel to request a “knowledge” element to be inserted in the felon in possession instruction, the jury expressed confusion not over the word “possess” but over the word “transport.” Where the trial court gave the standard jury instruction concerning felon in possession and the possession alleged was actual, it did not misstate or confuse the applicable law and we see no error in the trial court’s refusal to give an additional mens rea definition that was not set forth in the statute.

Defendant next argues that the trial court erred in refusing to dismiss the charges against defendant prior to trial when the police department failed to preserve potentially exculpatory evidence in direct violation of a discovery order. We disagree.

We review a trial court's decision regarding the appropriate remedy for noncompliance with a discovery order for an abuse of discretion. *People v Davie*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). We also review for an abuse of discretion a trial court's decision on a motion to dismiss. *People v Stone*, 269 Mich App 240, 242; 712 NW2d 165 (2005).

Defendant was initially charged in this matter in early 2008. On or about February 6, 2008, the district court entered a discovery order in that case. The order provided, in relevant part:

IT IS FURTHER ORDERED that [] the following are to be preserved so that they are not destroyed and that they may be available for inspection by the prosecution and Defense in the future:

1. Any and all video tape generated by Detroit Police Department relating to the stop and arrest of the defendant, Lamar Dwayne White, and his vehicle on January 25, 2008 . . .

Shortly after the discovery order was entered, however, the charges against defendant were dismissed, without prejudice. The case was reissued against defendant approximately ten months later. It is undisputed that no order was entered in the new case requiring preservation of any video. If the prosecution or Detroit police violated a discovery order by failing to preserve videotape evidence concerning the case, it would thus necessarily have to have been the discovery order entered by the district court in the prior case against defendant that was dismissed.

Defendant has not provided any authority suggesting that a discovery order survives dismissal of the case in which it was entered. We have long held that an appellant may not leave it to an appellate court to elaborate his arguments for him or search for authority to sustain or reject his position. See, *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *DeGeorge v Warheit*, 276 Mich App 587, 594-595; 741 NW2d 384 (2007). Thus, defendant's argument fails.

Even if this Court were to find that the discovery order survived and that the police department or prosecutor violated the same, dismissal is the most severe of sanctions for failure to comply with a discovery order and is not to be imposed without serious consideration to other alternatives. A court should employ the drastic sanction of dismissal only "where there has been a flagrant and wanton refusal to facilitate discovery, and where the failure has been conscious or intentional, rather than accidental or involuntary." *Frankenmuth Mutual Insurance Company v ACO, Inc*, 193 Mich App 389, 396-397; 484 NW2d 718 (1992). And, before imposing such a sanction, the court should consider various factors including: (1) whether the party has a history of failing to provide discovery, (2) whether the party has a history of refusing to comply with other court orders, (3) whether the party has a history of deliberately delaying the proceedings, (4) whether the violation was willful or accidental, (5) whether the opposing party has been prejudiced, and (6) whether a lesser sanction would better serve the interests of justice. *Bass v Combs*, 238 Mich App 16, 26-27; 604 NW2d 727 (1999), overruled in part on other grounds *Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 628; 752 NW2d 37 (2008).

While defendant has alleged here that the prosecution and police department did not preserve the videotape, he has not alleged that they did so deliberately or in bad faith, or that any other discovery provision or order was violated. Nor has he provided any indication whatsoever that the videotape was exculpatory, such that its lack of preservation prejudiced him. Given the above, the trial court did not abuse its discretion in denying defendant's motion to dismiss based upon the alleged violation of a discovery order.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto